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STATUTE CITED

Judicial Code, sections 242 and 243	1
21524—26	(1)



In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 82

THE DAVIS SEWING MACHINE COMPANY OF DELA-
ware, appellant

v.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 26-32) is reported in 60 Ct. Cls. 201.

JURISDICTION

The judgment to be reviewed was entered on January 26, 1925. (R. 32.) A petition for appeal was filed March 16, 1925. (R. 32.) Jurisdiction is invoked under Sections 242 and 243 of the Judicial Code as they stood prior to the Act of February 13, 1925. (Chap. 229, 43 Stat. 936.)

THE QUESTION

In this case the contract gave the Government the right to change specifications and also the right to terminate the contract upon making certain payments, none of which were for prospective profits. Changes were made that resulted in delays. The contract was terminated, no articles having been completed or delivered thereunder. A settlement contract was executed releasing all claims for prospective profits. The question here to be decided is whether in such a case the contractor is entitled to recover profits it would have made upon articles it claims it would have delivered prior to the termination had it not been for the delays due to changes in specifications.

STATEMENT

The facts found by the Court of Claims are as follows:

The appellant is a Delaware corporation. (R. 19.) The National Tool and Manufacturing Company is also a Delaware corporation engaged in a general manufacturing business. (R. 20.)

Under date of August 5, 1918, the United States made a contract with the National Tool and Manufacturing Company for the manufacture of 75,000 Very pistols. (R. 20.) Delivery was to commence September 1, 1918, and proceed at the rate of 12,500 pistols per month, all deliveries to be completed before March 1, 1919, and the price being \$5.00 each, a total of \$375,000. (R. 20.)

The contract also provided for changes in specifications as follows (R. 5):

From time to time, by written notice to the contractor, the contracting officer may make changes in the specifications and drawings or supplemental or substituted specifications and drawings. If any such change increases the cost to the contractor, a fair addition shall be made to its compensation; but if it reduces such cost a fair deduction shall be made therefrom, all as shall be determined by the Chief of Ordnance. No claim for additional compensation hereunder shall be allowed, nor shall the compensation be reduced, unless the change has been ordered in writing. For any delay in delivery attributable to such changes, a corresponding extension of time shall be allowed the contractor.

It also provided for a termination in the event of the termination or limitation of the war. (R. 10, 20, 21.) Such termination clause is as follows (R. 20, 21):

Termination.—This contract being necessitated by a state of war now existing, it is desirable and expedient that provision be made for its cancellation upon fair and equitable terms in the event of the termination or limitation of the war, or if in anticipation thereof or because of changes in methods of warfare the chief of ordnance should be of the opinion that the completion of this contract has become unnecessary. It is therefore

provided that any time, and from time to time, during the currency of this contract, the chief of ordnance may for any of the causes above stated notify the contractor that any part or parts of the articles then remaining undelivered shall not be manufactured or delivered.

In the event of such complete or partial termination the United States shall inspect all completed articles then on hand and such as may be completed within thirty (30) days after such notice, and shall pay to the contractor the price herein fixed for all articles accepted by and delivered to the United States. The United States shall also pay to the contractor the cost of the materials and component parts purchased by the contractor for the performance of this contract and then on hand in an amount not exceeding the requirements for the completion of this contract provided they comply with the specifications, and also all costs shown by the contractor to have been theretofore necessarily incurred in the performance of this contract and remaining unpaid; and the United States shall also protect the contractor on all obligations incurred necessarily and solely for the performance of this contract of which the contractor can not be otherwise relieved. To the above may be added such sums as the chief of ordnance may deem necessary to fairly and justly compensate the contractor for work, labor and service rendered under this contract.

The contractor immediately entered upon performance, but there were numerous discrepancies and errors in the specifications and drawings, and beginning almost immediately after the execution of the contract and continuing for more than two months thereafter many changes were ordered by the Government so that "no pistols were completed nor deliveries made" prior to the suspension and termination hereinafter set forth. (R. 21.) On December 11, 1918 (after the Armistice), the Government, by letter to the contractor, requested the suspension of the contract work, stating that "This request is made with a view to the negotiation of a supplemental contract providing for the cancellation, settlement, and adjustment of your existing contract in a manner which will permit of a more prompt settlement and payment than will be practicable under the terms of said existing contract." (R. 21.) The letter also requested acknowledgment of said notice and an indication of the contractor's decision as to compliance with the request. (R. 22.)

On December 18, 1918, the contractor wrote to the Government acknowledging receipt of the suspension and accepting the same "without prejudicing our rights under said contract. We take it from your request that immediate steps will be taken towards the negotiation of a settlement in the formation of a supplemental contract, thereby affording a prompt adjustment, settlement and

payment arising from the suspension and eventual cancellation of the original contract, and accept this condition as a consideration in our acceptance of the request for suspension." (R. 22.)

Work under the contract ceased, and on December 27, 1918, the Government acknowledged the contractor's acceptance of the suspension and enclosed an outline of method for presentation of claims. (R. 22.) On January 16, 1919, the contractor filed a claim in the sum of \$189,507.38, which included the several items specified on page 23 of the Record. (R. 23.) On May 21, 1919, a partial-payment supplemental contract was entered into between the contractor and the Government upon the basis of an immediate reimbursement of the contractor by an advance payment of \$103,650.66, and a speedy determination and payment of the various items as specifically provided for in said supplemental contract (R. 24), it being specifically provided in the preamble to the supplemental contract that the contractor is willing to agree to a complete termination of operations under the original contract "and to agree to waive all rights to prospective profits thereunder if he can secure forthwith reimbursement of a portion of the expenditures made and obligations necessarily incurred by him in performance of the uncompleted portion of said contract, and provision for the speedy determination and payment of the various items of reimbursement and remuneration hereinafter set forth" (R. 14). Said supplementary contract provided for the im-

mediate payment of \$103,650.66 (R. 15), which was so paid (R. 24), and further provided for a determination of the remaining amounts due under the terms of the original contract and such supplemental contract (R. 16), all existing rights and obligations of the parties under the original contract to remain in full force and effect except as expressly provided in said supplementary contract (R. 14), Article III of said supplemental contract expressly provided that (R. 14, 15):

The Contractor agrees that it will not perform any further work or services, or incur any further expense or obligations in connection with the performance of the uncompleted portion of said original contract, and will use his best efforts in every proper way to reduce such liabilities or obligations as have already been incurred in connection with such performance; and the Contractor hereby, and for all time, *waives all claim to the prospective profits which he might have made from the performance of that portion of said original contract which under the terms of this supplemental agreement will not be performed.* (Italics supplied.)

Article V of said supplemental contract (R. 15, 16) provided that the Government would pay to appellant such additional sum as with said \$103,650.66 "will reimburse and remunerate the Contractor for such portion of his expenditures, obligations and liabilities necessarily incurred, and for

work, labor and services rendered in connection with the performance of the original contract, as is properly and fairly apportionable to the uncompleted portion thereof, and for expenditures incurred and services properly rendered under this supplemental agreement, as follows":

Section A—For raw materials on hand;

Section B—For articles in process;

Section C—A fair remuneration for expenses and services of the contractor in connection with items A & B, but not to exceed specified percentages thereof;

Section D—Reimbursement for amounts paid in settlement of subcontracts and commitments for supplies;

Section E—Expenses paid for custody and protection of property since date of suspension;

Section F—Certain payments on special facilities, if any, applicable to uncompleted portion of the contract;

Section G—Such additional sums, if any, as the Secretary of War may deem necessary fairly and justly to compensate the contractor for expenditures, obligations, and liabilities necessarily incurred and for work, labor, and service necessarily rendered under the original contract or in preparation for the performance thereof, or under this supplemental agreement.

The Government later tendered the amount of \$14,192.25, which it determined to be the amount due under the terms of the original and the supple-

mental contracts, after deducting the advance payment so made. The claim of \$49,800.00, which is for profits the contractor contends it would have made on deliveries it could have completed prior to the cancellation had the Government not changed the specifications and drawings, was wholly disallowed. (R. 24.) The tender was rejected by the contractor, and after an unsuccessful appeal to the Board of Contract Adjustment of the War Department this suit was brought.

The court below found as a fact that the total cost and expense to the contractor of its operations under the original contract, together with the remuneration provided for in the supplemental contract, amounted to \$136,053.99 (R. 24), of which amount the Government had paid under the supplemental contract \$103,650.66 and was entitled to a credit for materials retained by the contractor in the sum of \$18,211.08, leaving a balance unpaid of \$14,192.25 (R. 25), which was the sum which the Government had previously tendered (R. 24), but which had been refused by appellant. For this amount the court rendered judgment against the Government, which is not here questioned.

The National Tool and Manufacturing Company by amendment of its certificate of incorporation changed its name to the Blue Bird Manufacturing Company. Through a receiver's sale the assets of the Blue Bird Manufacturing Company, including this claim, were transferred to appellant. (R. 25, 26.)

The court further found that "If the profits the contractor would have realized upon a full performance of the contract work be apportioned between the performed and the unperformed portions of the work, the amount of such profits apportionable to the portion of the work that had been performed at the time of the suspension and termination of the contract would be \$62,746.10." (R. 25.)

The court further found that if the contract had not been delayed by errors and changes in specifications and drawings the contractor would have completed and delivered such quantities of pistols prior to the suspension and termination as would have yielded a profit of \$44,818.64. (R. 25.)

The appellant in this suit claimed the difference between its alleged costs under the contracts and the amounts paid by the Government, and a further large sum which it contends was the profit it would have earned upon pistols it would have delivered prior to the suspension and termination had it not been for the delay caused by changes of specifications made by the Government.

The court held that the original contract provided for a termination and the payments to be made in the event thereof, which did not include profits on undelivered articles, and that therefore appellant was not entitled to such profits under the original contract. It further held that the supplemental settlement contract which appellant voluntarily entered into expressly waived any antici-

pated profits, and that therefore appellant was not entitled to recover such items.

ARGUMENT

The only contention made by appellant in its brief is that the Court of Claims committed error in its refusal to allow the profits which the appellant would have made upon deliveries of pistols prior to the termination of the contract had it not been for the changes in specifications by the Government. It contends that such an allowance is necessary to give appellant just compensation for the cancellation and is required under the terms of the contract providing for termination, and especially the provisions of the original and supplemental contracts providing that the Government should pay such additional sums, if any, as the Secretary of War may deem necessary to fairly and justly compensate the contractor for expenditures, obligations, and liabilities necessarily incurred.

Under the terms of the original contract the Government had the right to make changes in specifications and the contract specifically provided for the remedies of appellant in the event of such changes. The contract also gave the right to the Government to terminate it, and specifically provided the remedies of the appellant in that event, none of which remedies included any prospective or anticipated profits upon articles which had not been completed or delivered. Under the provisions of the supplemental contract all claims for prospective and anticipated profits were expressly waived and re-

leased by appellant. The Court of Claims has found as a fact the amount of all costs incurred by appellant under the contract, which finding of fact is conclusive in this Court, and has given judgment for the balance thereof remaining unpaid. The appellant is entitled to no more.

Section G of Article V of the supplemental contract upon which appellant attempts to base its claim, provides that the United States shall pay "Such additional sums, if any, as the Secretary of War may deem necessary fairly and justly to compensate to the contractor for expenditures, obligations, and liabilities necessarily incurred and for work, labor and service, necessarily rendered, under the original contract or in preparation for the performance thereof, or under this supplemental agreement." (R. 16.) This provision contemplates only reimbursement for actual costs and expenditures made and does not contemplate any anticipated profits, and the Government is obligated to pay no sums thereunder unless the Secretary of War has determined them to be due.

The judgment of the Court of Claims is correct and should be affirmed.

Respectfully submitted.

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Solicitor General.

HERMAN J. GALLOWAY,
Assistant Attorney General.

NOVEMBER, 1926.